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Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

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| In the Matter of |) | JUN 1 |
| Requests for Emergency Temporary Relief of the Minnesota CLEC |) | OFFICE OF THE SECRETORY |
| Consortium and the Rural Independent |) | CC Docket No. 96-262 |
| Competitive Alliance Enjoining |) | , |
| AT&T Corp. from Discontinuing Service |) | |
| Pending Final Decision |) | |

OPPOSITION OF WORLDCOM, INC.

The Commission should dismiss the petitions of the Minnesota CLEC Consortium ("MCC") and the Rural Independent Competitive Alliance ("RICA") for emergency temporary relief enjoining AT&T Corp. ("AT&T") from discontinuing service.

Petitioners improperly seek a preliminary injunction pending resolution of a rulemaking. If petitioners believe that AT&T's conduct may violate rules now under consideration by the Commission, petitioners should seek interim rules pending the adoption of final rules. If, alternatively, petitioners believe that AT&T's conduct violates existing statutory provisions, then petitioners should file complaints against AT&T pursuant to Section 208. Such complaints could incorporate requests for preliminary relief pending resolution of the complaints. Indeed, the Commission has established expedited complaint procedures that may be well-suited for such circumstances. Finally, even if the Commission is inclined to entertain these petitions, it must deny them. Petitioners have misstated governing law and have failed correctly to balance the harms that would follow

No. of Copies rec'd O + 4 List A B C D E either issuance or denial of the requested relief. It would not be in the public interest to allow Petitioners to force AT&T to accept their access services.

I. The Commission should dismiss Petitioners' requests. It is procedurally inappropriate to enjoin conduct that may or may not later be prohibited in a pending rulemaking.

Petitioners have improperly sought a preliminary injunction pending completion of a rulemaking. This is the equivalent of asking a court to enjoin business activity because Congress is considering a bill that might prohibit the activity at issue. As a policy matter, the issuance of such injunctions would work the very harm that Petitioners claim it would avoid. An injunction pending resolution of a rulemaking might be seen to prejudice the Commission's deliberations in the rulemaking. Such an injunction would suggest that the Commission had already made up its mind on matters still under consideration. When a carrier's action might or might not violate inchoate rules, it would be totally inappropriate for the Commission to enjoin such action. This is not to say that the Commission is powerless in such instances. Given sufficiently exigent circumstances, the Commission could issue emergency interim rules. Needless to say, Petitioners have not demonstrated such exigency here.

Courts have consistently recognized that only in very limited circumstances can administrative agencies adopt, in response to emergency situations, interim rules outside of the Administrative Procedure Act's ("APA") notice and comment requirements.²
Under Section 553(b)(3)(B) of the APA, an agency may promulgate such rules if it "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in

¹ 47 C.F.R. § 1.412(c).

the rules issued) that notice and public procedures thereon are impracticable, unnecessary, or contrary to the public interest." Such exceptions "will be narrowly construed' and only reluctantly countenanced." Thus, in unusual emergency situations agencies may adopt interim rules pending the completion of formal rulemaking.

Here, Petitioners do not seek emergency interim rules. Nor do they attempt to show the type of emergency situation that would justify such rules. Instead, Petitioners frame their requests as petitions for preliminary injunction pending completion of rulemaking. Yet, if issued, an injunction would have the same effect as interim rules prohibiting the conduct to which Petitioners object. The Commission cannot grant such relief. The four-part test that governs preliminary injunctions is an inadequate basis on which to promulgate emergency, interim rules under the APA. Since a preliminary injunction would have the same effect as adoption of emergency interim rules, granting such an injunction would impermissibly expand the Commission's discretion to adopt interim rules without notice and comment pending completion of a formal rulemaking.

Petitioners remain free to initiate complaint proceedings against AT&T pursuant to Section 208 of the Communications Act. Pending completion of such proceedings, Petitioners could seek preliminary injunctions against AT&T. The Commission is plainly authorized to issue such injunctions. But whatever authority the Commission has to enjoin activity that is the subject of ongoing complaint proceedings, the Commission may

² See, e.g., American Federation of Government Employees, AFL-CIO, et al. v. Block, 655 F.2d 1153 (D.C.Cir.1981).

³ 5 U.S.C. § 553(b)(3)(B).

⁴ State of New Jersey, Department of Environmental Protection v. EPA, 626 F.2d 1038,1045 (D.C. Cir. 1980).

⁵ Indeed in some cases a preliminary injunction may issue even though the harm from a failure to enjoin barely exceeds harms caused by the injunction.

not issue injunctions pending the completion of rulemaking proceedings without circumventing the APA's requirements.

II. Even if the Commission could grant the requested relief, Petitioners have not made the four-part showing required for preliminary injunctions.

In cases where preliminary injunctions may be issued, parties seeking such injunctions must show: (1) a strong likelihood of success on the merits; (2) the possibility of irreparable injury to the requesting party if preliminary relief is not granted; (3) a balance of hardships favoring the requesting party; and (4) that the requested relief advances the public interest.⁶ Since Petitioners have not shown that any of these conditions are met, the Commission cannot grant their requests.

A. Petitioners have not shown a likelihood of success on the merits.

AT&T has instructed Petitioners to cease routing traffic to AT&T's network.

AT&T has also instructed Petitioners not to presubscribe customers to AT&T's services.

According to Petitioners, these demands violate a host of statutory provisions. In every case, Petitioners have failed to prove such violations.

Petitioners claim that AT&T's refusal to accept originating access services amounts to a refusal to serve a customer based on the identity of that customer's local exchange carrier. According to Petitioners, such a refusal would violate Sections 201(a) and (b) of the Communications Act. Petitioners have mischaracterized both AT&T's action and the requirements of the statute. By saying that AT&T has refused service to customers, Petitioners imply that AT&T is in a position to provide service to those

⁶ See, e.g., Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197 (9th Cir. 1980).

⁷ RICA Petition at 6; MCC Petition at 5.

customers. In fact, AT&T is unable to offer services to Petitioners' customers because Petitioners are unwilling to provide originating access services to AT&T on terms and conditions that AT&T finds reasonable.

Under Section 201(a), it is the duty of every common carrier to furnish service upon reasonable request therefor. But when an interexchange carrier ("IXC") declines the originating access services of a competitive local exchange carrier ("CLEC") because those services are offered on terms and conditions that the IXC finds unreasonable, the IXC is in no position to provide services to end users served by that CLEC. In this context, a request for service would not be reasonable, since to meet that request the IXC would have to purchase originating access services without regard to the reasonableness of the terms and conditions on which they are offered. If Petitioners are correct, a single customer request is sufficient to force an IXC to accept a CLEC's originating access services on terms and conditions that are dictated by the CLEC. This cannot be what the Commission intended when it decided to allow market forces to discipline switched access rates. Markets require willing buyers and willing sellers. If the terms of originating access services can be dictated to IXCs, then there are no willing buyers and no market forces.

Nor is this consistent with the current environment. An end user is not free to select any IXC – only those IXCs doing business in the end user's area that have ordered feature group access arrangements from the end user's LEC. An IXC doing business only in New England does not today need to accept originating traffic from a customer in another region of the country.

⁸ In the Matter of Access Charge Reform, CC Docket No. 96-262, First Report and Order (rel. May 16, 1997), ¶ 263.

Section 201(b) prohibits unjust or unreasonable charges, practices, classifications, or regulations with respect to communications services. Petitioners argue that AT&T's "unilateral refusal to provide service to customers of Petitioners is 'unjust and unreasonable' under Section 201(b) because there is no reasonable basis under either the facts or under the terms of AT&T's tariffs to deny the requests of customers of CLECs for AT&T's tariffed interstate services." But since AT&T does not willingly purchase the Petitioners' originating access services, AT&T is simply unable to offer services to the Petitioners' customers. It is impossible to determine whether or not AT&T's practice is unreasonable without investigating the reasonableness of the Petitioners' originating access services. For example, it cannot be reasonable to require IXCs to offer services at a loss. AT&T cannot be expected to sell long distance service rates near or below the price of the access services that are necessary inputs to its long distance services. Since the reasonableness of AT&T's practice cannot be assessed based on Petitioners' pleadings, Petitioners have failed to demonstrate a likelihood of success on the merits.

Petitioners' claim that AT&T's practice violates Section 202(a) must fail for the same reason. ¹⁰ That section prohibits unreasonable discrimination. In this case, AT&T could argue that any discrimination is perfectly reasonable based on Petitioners' refusal to negotiate reasonable terms and conditions for originating access.

Petitioners assert that AT&T's action violates Section 203(b) by imposing a change, in the form of a limitation on the availability, to its tariffed services without the required notice to the Commission. AT&T could argue that its tariff offerings are by definition only available where AT&T is able to establish access arrangements. No IXC

⁹ MCC Petition at 6.

¹⁰ RICA Petition at 7; MCC Petition at 7.

can be expected to offer services to end users for whom the IXC cannot establish access arrangements. By this argument, AT&T has not modified its tariff, but simply recognized the limits of its ability to offer services.

The argument that AT&T's action violates Section 214(a) by discontinuing, reducing, or impairing service to a community or part of a community must also fail.¹² According to petitioners, their customers are "part of a community" within the meaning of Section 214.¹³ Assuming arguendo that this is correct, AT&T has not discontinued, reduced, or impaired service to that community. In order for AT&T to discontinue, reduce, or impair service to the part of the community served by Petitioners, AT&T would first have to be able to offer services to that part of the community. Yet without establishing originating access ayrrangements, AT&T cannot offer such services. AT&T may argue that its failure to establish access arrangements was caused by Petitioners' refusal to negotiate in good faith. In these circumsÿances, AT&T cannot be said to have discontinued, reduced, or impaired service to part of a community. Indeed, one could argue that Petitioners have impaired AT&T's ability to offer services by attempting to force AT&T to accept originating access services on terms and conditions that AT&T finds unreasonable.

Finally, Petitioners claim that AT&T has refused to interconnect in violation of Section 251(a). WorldCom has previously argued that the Commission must interpret the duty to interconnect in light of the Act's intent to establish a competitively-provided, seamlessly-interconnected public switched telephone network. While WorldCom will

¹² RICA PetiýXtion at 8; MCC Petition at 8.
13 See, e.g., MCC Petition at 9.

¹⁴ RICA Petition at 8; MCC Petition at 10.

not repeat those arguments here, interpreted in this light there is no obligation for a non-dominant IXC to accept the originating access services of a particular LEC. Accordingly, the argument that AT&T has violated Section 251(a) is without merit.

Petitioners have failed utterly to demonstrate a likelihood of success on the merits. The outcome of any adjudication of these claims woyld depend substantially upon the resolution of a number of questions of fact related to the reasonableness of actions by AT&T as well as by the Petitioners. In this context, Petitioners' bare pleadings do not show a strong likelihood of success.

B. Petitioners have not shown irreparable injury.

Petitioners claim that without relief both they and their customers will suffer irreparable harm. ¹⁵ They argue that without an injunction, Petitioners' customers that attempt to obtain AT&T's services will be denied theiÿ choice of carrier and will suffer substantial inconvenience and confusion. Thÿy argue further that an injunction is needed to enable Petitioners to compete on an even basis for all current customers of AT&T. Neither argument can'carry the requisite burden.

In fact, Petitioners themselves appÿar to hold the key to unlocking this dispute. Petitioners could either agree to accept the terms offered by ÿ+1XAT&T, or pursue a Section 208 complaint proceeding against AT&T. Acceptance of AT&T's terms would terminate the dispute. In the context of a complaint proceeding, the parties could agree on a number of mechanisms by which Petitioners' customers could obtain AT&T's services. For example, the parties might agree that AT&T could make access payments into an escrow account pending resolution of ÿhe complaint. Inÿthe meantime, Petitioners customers could obtain AT&T's services, and Petitioners would suffeÿ+1Xr no harm.

C. Petitioners have not correctly balanced the hardships.

According to the Petitioners, "the only cost which the requested relief could possibly impose on AT&T is monetary." This ignores the fact that AT&T does not charge different rates to each end user based on the access charges of that end user's LEC. Instead, AT&T ÿverages its costs across its entireÿcustomer base, thereby yielding uniform charges. AT&T were forced to accept originating access services without regard to their level, AT&T might have to increase rates across the board for all customers. This would put AT&T at a disadvantage in competing with regional carriers that did not operate in areas served by Petitioners. Such carriers would not have to fü+1Xactor Petitioners' access charges into their cost equations, and would thus enjoy a cost advantage over AT&T. Accordingly, the requested relief could substantially harm AT&T by making it more difficult for AT&T to compete in all parts of the country.

D. The requested relief would not advance the public interest.

AT&T has apparently determ} ned that it cannot profitably offer service to Petitioners' customers. It would not be in the public interest to force AT&T to accept Petitioners' originating services. Such coercion is inimical to the Commission's announced preference for market place solutions. Moreover, it would likely harm customers in all parts of the country. If Petitioners succeed in forcing AT&T to accept theirÿterms, it is inevitable that ÿther CLECs will follow suit. Increasing local competition, a good thing, would then yield higher average access charges, a very bad thing. As average access charges increase, AT&T and other IXCs will inevitably be forced to raise rates. By granting the requested relief, týe Commission would be taking

¹⁵ RICA Petition at 9; MCC Petition at 10.

¹⁶ MCC Petition at 11.

the first step to higher long distance charges. By denying it, the Commission would affirm its commitment to free markets over the heavy hand of regulation.

III. Conclusion

The requests for preliminary injunctions must be denied. Under the APA, the Commission cannot issue an injunction pending the resolution of a formal rulemaking. Issuance of such an injunction would impermissibly expand the Commission's authority to adopt interim rules outside of the APA's notice and comment requirements. If Petitioners believe that interim rules are needed, they must show some extraordinary emergency. They have not done so here.

Even if the Commission were inclined to consider these petitions, it would have to deny them. Petitioners are unlikely to succeed on the merits. They have not shown a likelihood of irreparable injury. Granting these petitions would subject both AT&T and the public generally to harms far beyond any the Petitioners are likely to suffer.

WorldCom again urges the Commission to pursue market place solutions to the problem of unacceptably high CLEC access charges. Since WorldCom last commented on this matter, the D.C. Circuit Court of Appeals has affirmed the Commission's authority to impose mandatory detariffing on non-dominant carriers. WorldCom strongly recommends that the Commission move quickly to completely detariff CLEC access charges. In a detariffed environment, CLECs and IXCs would have no choice but to negotiate mutually acceptable access arrangements.

¹⁸ MCI WorldCom, Inc. v. FCC, (D.C. Cir. April 28, 2000).

¹⁷ Indeed, to some extent the Act and the Commission's rules require AT&T to average its rates.

Respectfully submitted, WorldCom, Inc.

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June 14, 2000

CERTIFICATE OF SERVICE

I, Vivian Lee, do hereby certify that copies of the foregoing Opposition of WorldCom, Inc. In the Matter of Requests for Emergency Temporary Relief of the Minnesota CLEC Consortium and the Rural Independent Competitive Alliance Enjoining AT&T Corp from Discontinuing Service Pending Final Decision were sent via first class mail, postage paid, to the following on this 14th day of June, 2000.

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